77-1854

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-

In The Matter of Application of

CHARLES E. SIGETY and KATHARINE S. SIGETY,
Appellants,

against

CHARLES J. HYNES, Deputy Attorney General
of the State of New York (Special Prosecutor)
and FRANCIS WASCHLER,
Appellees,

For an Order Pursuant to Article 23 of
the Civil Practice Law and Rules.

On Appeal From The Supreme Court Of The
State of New York, Appellate Division,
First Department

JURISDICTIONAL STATEMENT

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June 28, 1978

TABLE OF CONTENTS

Index to Appendix

Table of Cases

STATUTES AND RULES CITED

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-

In the Matter of the Application of

CHARLES E. SIGETY and KATHARINE S. SIGETY,

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against

CHARLES J. HYNES, Deputy Attorney General of the State of New York (Special Prosecutor) and FRANCIS WASCHLER,

Appellees,

For an Order Pursuant to Article 23 of the Civil Practice Law and Rules.

JURISDICTIONAL STATEMENT

Charles E. Sigety and Katharine S. Sigety (the "Sigetys") appeal from an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered on March 30, 1978, which affirmed the order of the Supreme Court of the State of New York, County of New York, entered November 2, 1977, denying their application for an order vacating in part an office subpoena served by appellee Charles J. Hynes, Deputy Attorney General of the State of New York (Special Prosecutor) ("Hynes") on appellee Francis Waschler ("Waschler") pursuant to Section 63, subdivision 8, of the New York Executive Law ("the subpoena") and directing compliance

therewith by Waschler by 9:30 a.m. on Thursday, November 3, 1977. Pursuant to various orders of the Appellate Division, enforcement of so much of the November 2 order as directs compliance with the subpoena by Waschler has been stayed pending the hearing and determination of this appeal.

Proceedings Below

The subpoena directed Waschler to produce

> All copies in [his] possession of all City, State, and Federal Income Tax Returns for Charles E. Sigety, 175 East 96th Street, and all workpapers and supporting documents used in the preparation of such Income Tax Returns, for the years 1970 through 1976.

It is not disputed that the only tax returns and related documents in the possession of Waschler relate to the year 1976.

The subpoena was *not* issued in connection with the investigation of a lawfully convened grand jury, subject to the supervision of a court of law. It was issued instead pursuant to Section 63, subdivision 8, of the New York Executive Law*, purportedly to aid Hynes in his investigation of the nursing home industry in New York.

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* Section 63, subdivision 8, of the New York Executive Law provides as follows: Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall, inquire into matters concerning the public peace, public safety and public justice. For such purpose he may, in his discretion, and without civil service examination, appoint and employ, and at pleasure remove, such deputies, officers and other persons as he deems necessary, determine their duties and, with the approval of the governor, fix their compensation. All appointments made pursuant to this subdivision shall be immediately reported to the governor, and shall not be reported to any other state officer or department. Payments of salaries and compensation of officers and employees and of the expenses of the inquiry shall be made out of funds provided by the legislature for such purposes, which shall be deposited in a bank or trust company in the names of the governor and the attorney-general, payable only on the draft or check of the attorney-general, countersigned by the governor, and such disbursements shall be subject to no audit except by the *(Footnote continued on page 3.)*

By order to show cause signed by Hon. Aloysius J. Melia dated October 26, 1977, the Sigetys sought to challenge the subpoena only insofar as it sought production by their personal accountant of portions of their personal joint income tax returns, which have no relation whatsoever to the matters, which Hynes has been authorized by law to investigate. The Sigetys have agreed to produce those portions of their joint income tax returns, which relate to the operation of Florence Nightingale Nursing Home, of which Mr. Sigety is the sole proprietor.

Upon the hearing of the Sigetys' application before Justice Melia on October 28, 1977, Hynes contended, and the Court ruled, that the Sigetys did not have standing to challenge the lawfulness of the subpoena, and, therefore, did not reach the

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governor and the attorney-general. *The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require that any books, records, documents or papers relevant or material to the inquiry be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules.* If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a misdemeanor. It shall be the duty of all public officers, their deputies, assistants and subordinates, clerks and employees, and all other persons, to render and furnish to the attorney-general, his deputy or other designated officer, when requested, all information and assistance in their possession and within their power. Each deputy or other officer appointed or designated to conduct such inquiry shall make a weekly report in detail to the attorney-general, in form to be approved by the governor and the attorney-general, which report shall be in duplicate, one copy of which shall be forthwith, upon its receipt by the attorney-general, transmitted by him to the governor. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the governor or the attorney-general the name of any witness examined or any information obtained upon such inquiry, except as directed by the governor or the attorney-general, shall be guilty of a misdemeanor. (Emphasis added.)

question of whether the subpoena was in fact lawful. An order so holding was entered in November 2, 1977.*

The Sigetys appealed from that order. By a unanimous memorandum decision and order dated March 30, 1978, the Appellate Division affirmed the decision below without opinion. No appeal to the New York Court of Appeals lies from that order.

JURISDICTION

The jurisdiction of this Court to review by direct appeal the order of the Supreme Court of the State of New York, Appellate Division, First Department, is conferred by 28 U.S.C. §1257 (2). *Dahanke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921); *La Crosse Tel. Corp. v. Wisconsin Board,* 336 U.S. 18 (1948); *Guss v. Utah Labor Board,* 353 U.S. 1 (1957).

QUESTION PRESENTED

One question is presented by this appeal:

1. Does a client have standing to challenge in a court of competent jurisdiction the lawfulness of an office subpoena served on his personal accountant, which compels production of the client's private papers?

STATEMENT OF THE CASE

In the New York Supreme Court, County of New York, the Sigetys attempted to challenge the lawfulness of an office subpoena issued by Hynes and served upon their personal accountant, Waschler. The subpoena required Waschler to turn over to Hynes the personal tax returns of the Sigetys and other related documents.

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* The transcript of the hearing before Justice Melia on October 28, 1977, when he rendered his opinion from the bench, is annexed hereto as Appendix A.

Without reaching the merits of the Sigetys' application, the New York court held that they lacked standing to challenge the lawfulness of the subpoena, which had been served upon a third-party, and, therefore, dismissed the proceeding. That ruling was unanimously affirmed on appeal.

THE QUESTION IS SUBSTANTIAL

The New York court held that *Fisher v. United States,* 425 U.S. 391 (1976), *Miller v. United States,* 425 U.S. 435 (1976), and *Couch v. United States,* 409 U.S. 322 (1973), all stand for the proposition that a client does not have standing to challenge in a court of competent jurisdiction the lawfulness of a subpoena served on his accountant. Such a holding, if sustained by this Court, will result in the anomalous situation where the sole person interested in the lawfulness of an office subpoena (the "target" of the investigation) will not be permitted to have his day in court. Accordingly, only third-parties, who have no interest in the subject matter of the subpoena, will have standing to challenge its lawfulness.

A. Neither *Fisher, Miller,* Nor *Couch* Are "Standing" Cases.

Neither *Fisher, Miller* nor *Couch** are "standing" cases. In each of those cases, the party challenging the lawfulness of a grand jury subpoena had his day in court—an opportunity denied the Sigetys by the courts below.

In both *Fisher* and *Couch,* private individuals were suspected by the United States of tax fraud. In each case the United States sought to subpoena for presentment to the grand jury the workpapers of the accountant, who had prepared the allegedly fraudulent tax returns, as well as various records

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* Each of the three cases involved a grand jury subpoena, rather than an office subpoena as is the case here.

delivered to the accountant for that purpose. No one could reasonably dispute the relevancy of such documents to an investigation of tax fraud.

In both *Fisher* and *Couch,* the targets claimed that the documents (including the workpapers of their accountants) were cloaked with a Fifth Amendment privilege. In both cases this Court held (a) that, in connection with a grand jury investigation of tax fraud, the targets had no reasonable expectation of privacy with respect to the documents reviewed and prepared by their respective accountants in connection with the preparation of the allegedly fraudulent tax returns and (b) that the production of those documents by third-parties did not involve any "testimony", incriminating or otherwise, by the targets.

Of significance to this appeal, however, is this Court's approval in *Couch* of the District Court's action in granting Miss Couch permission to intervene to object to the production of the records in question, thereby *ipso facto* recognizing her "standing". 409 U.S. 327.

In *Miller,* this Court held only that an individual has no reasonable expectation of privacy protected by the Fifth Amendment with respect to records routinely maintained and owned by his bank.

It is significant in the context of this case to perceive that the lawfulness of the grand jury subpoena (as distinguished from a claim of privilege against production of documents subpoenaed thereby) was not in issue in *Couch, Fisher* or *Miller.* Here, unlike those cases, the Sigetys challenge the lawfulness of the subpoena itself.

B. A Client, As the Real Party in Interest, Has Standing To Challenge the Lawfulness of an Office Subpoena Served on His Personal Accountant, which Compels Production of the Client's Private Papers.

Relying on *Fisher, Miller,* and *Couch,* Hynes contended, and the courts below ruled, that a client does not have standing to challenge the lawfulness of an office subpoena served upon his personal accountant, which compels production of the client's private papers. It thus follows, according to Hynes and the courts below, that pursuant to Section 63, subdivision 8, of the New York Executive Law, Hynes may with impunity subpoena any and all records pertaining to the personal affairs of the Sigetys from third-parties without regard either (a) to their relevance to the scope of his inquiry as authorized by law or (b) to the existence of a "demonstrable inquisitorial basis" which would require their production.* Mr. Hynes and the courts below would have us believe that only the third-parties, upon whom such subpoenas are served (who have no interest whatsoever in the affairs of the Sigetys), have standing to challenge what, under such circumstances, would be Hynes' clear prosecutorial excesses.

Of course, one logically inquires—if the third-parties have no interest in the affairs of the Sigetys, why would they wish to incur the inconvenience and legal expense of challenging the lawfulness of Hynes' subpoenas. Common sense indicates that most people would follow the path of least resistance and produce the documents, without questioning the lawfulness of the subpoena. The average person's concept of good citizen-

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* Because office subpoenas are not subject to the same degree of judicial scrutiny as are grand jury subpoenas, the New York Court of Appeals has held that the Constitution mandates a stronger showing of relevance as a prerequisite to the issuance of an office subpoena. *In re Sussman v. New York State Organized Crime Task Force,* 39 N.Y.2d 227 (1976).

ship, we submit, does not rise so high as to cause him to incur the considerable expense of challenging unlawful office subpoenas as a matter of patriotic principle. Generally, only persons interested in the subject matter of the subpoena will suffer the inconvenience and expense of such a process.

In his concurring opinion in *Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975), Mr. Justice Marshall adopted such a common sense approach to due process of law.

> As the Court points out, the District Court properly entertained the action [to enjoin implementation of the subpoena] in order to provide a forum in which respondent could assert its constitutional objections to the subpoena, *since a neutral third party could not be expected to resist the subpoena by placing itself in contempt. Ante,* at 1820 n. 14; see Perlman v. United States, 247 U.S. 7, 12, 38 S.Ct. 417, 419, 62 L.Ed. 950 (1918); United States v. Doe, 455 F.2d 753, 756-757 (CA1), vacated *sub nom.* Gravel v. United States, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972); see also United States v. Nixon, 418 U.S. 683, 691, 94 S.Ct. 3090, 3099, 41 L.Ed.2d 1039 (1974). 421 U.S. 514. (Matter in brackets and emphasis added.)

Prior to the New York courts' misinterpretation of *Fisher, Miller* and *Couch,* such was the law of the State of New York. *Commission on Governmental Operations of the City of New York v. Manhattan Water Works, Inc.,* 10 App.Div.2d 306 (1st Dept. 1960).

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the New York Supreme Court, Appellate Division, First Department, and remand the proceeding to the New York Supreme Court, New York County, for determination of the application of the Sigetys on its merits.

Dated: New York, New York
June 28, 1978

Respectfully submitted,

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Charles E. Sigety and
Katharine S. Sigety
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Of Counsel:

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APPENDIX A
Transcript of October 28, 1977 oral decision

New York Supreme Court

COUNTY OF NEW YORK

PART 37

In The Matter of the Application of

CHARLES E. SIGETY and KATHARINE S. SIGETY,
Petitioners,

-against-

CHARLES J. HYNES, Deputy Attorney General
of the State of New York (Special Prosecutor)
and FRANCIS WACHSLER,
Respondents,

For an order Pursuant to Article 23 of the Civil
Practice Law and Rules.

100 Centre Street
New York, New York
October 28, 1977

Before:

HON. ALOYSIUS J. MELIA,
Justice

Appearances:

REBOUL, MacMURRAY, HEWITT, MAYNARD & KRISTOL
Attorneys for Petitioners
75 Rockefeller Plaza
New York, New York 10019

By: J. JOSEPH BAINTON, ESQ., OF COUNSEL

RUTH MONTOYA
Official Court Reporter

KOSTELANETZ & RITHOLZ, ESQS.
Attorneys for Respondent
Francis Wachsler
80 Pine Street
New York, New York

By: LEONARD ROSENBLATT, ESQ., Of Counsel

CHARLES J. HYNES
Special Prosecutor for Nursing Homes,
Health and Social Services
270 Broadway
New York, New York

By: DAVID E. RUCK, Special Assistant Atty. General

* * *

THE CLERK: On the motion and hearing calendar, Sigety against Hynes.

MR. RUCK: Charles Hynes, Deputy Attorney General, 270 Broadway, by David E. Ruck, Special Assistant Attorney General.

Your Honor, I have an affirmation in opposition to the application brought on by the Petitioner, and I have served copies upon the co-respondent and upon the petitioner.

MR. ROSENBLATT: My name is Leonard Rosenblatt; I am with the firm of Kostelanetz and Ritholz, we represent the respondent, Francis Wachsler.

May the record reflect that I am handing up an affidavit of Mr. Francis Wachsler, which I have served upon the petitioner and co-respondent. (Handed).

(A short recess was then taken in the proceeding.)

THE CLERK: Order in the Court, remain seated.

Colloquy

THE COURT: In the matter of the application of Charles and Katharine Sigety for an Order to Show Cause to restrain the Deputy Attorney General, Special Prosecutor for Nursing Homes and Private Proprietary Homes for Adults, from requiring the compliance with a subpoena served on the accountant for the Sigetys to produce income tax returns and supporting documentation in connection therewith, first of all, the Special Prosecutor states that the Sigetys have no standing to make this application, in support of this, citing the United States against Miller and Shapiro against Chase Manhattan Bank.

The Shapiro-Chase case was a case before me in this Court, and there, I ordered the turnover of the similar documents and others. And that was unanimously sustained by the Appellate Division on the basis of the Miller case and the law generally applicable at that time and now.

So, I find here that there is no standing on the part of the Sigetys. But, in any event, assuming arguendo the standing, clearly, there is no standing for the imposition of fourth or fifth Amendment rights; that is abundantly clear. And I think that counsel for the Sigetys, in substance, concedes that. But counsel argues, in support of Sigety, that they do have standing with respect to breadth and relevancy of the required documents and testimony.

I do not think that is so, I find no standing. But again, assuming standing, I think that the subpoena is not effective for overbreadth or for lack of relevancy.

In that connection, I might point out that the history of the nursing home investigation is extensive. It had its genesis in legislative inquiries and the appointment of legislative commissions. In addition, the executive branch of the government, in the person of the governor, saw fit to appoint the Abrams Commission to look into this general area as well.

Colloquy

So unlike the Lentini case, where the activities of a City commissioner were found defective in this regard, because of a lack of relevancy—there, it was just a haphazard use of the power of subpoena without a proper showing of relevancy—here, based upon the history of this investigation, which, as I say, has been extensive, bringing into play the powers of the legislature, the powers of the governor, and from all of that, it was determined that there was adequate basis for the governor, acting through the Attorney General, and vice versa, to appoint a special prosecutor to examine that which was unearthed during the legislative investigations, as well as the governor's interest in the matter. So the extraordinary remedy of the appointment of the Special Prosecutor was found to be required, and that was done, and the investigation has proceeded.

Now, there seems to be, first of all, relevancy as to the overall investigation. As to the breadth, because of the findings of these various commissions and legislative bodies, the breadth and scope of the investigation, as found in the executive order signed by the governor, is quite broad. And insofar as we are concerned here with nursing homes, in effect, it directs the Special Prosecutor to go into every aspect of the operation of nursing homes, to examine the whole gamut.

Clearly, in the case we have here, Sigety, it is conceded that some aspects of the tax returns are concerned with the nursing home. It is conceded, first of all, that they are relevant and it is agreeable to turn them over. The argument is merely that the rest of the tax returns are not relevant.

Well, first of all, the law is very clear that opposing counsel is not required to accept the dictum of the other counsel that they aren't relevant; that is a determination that counsel is permitted to make on his own.

Colloquy

Now, attempts have been made in the past to limit the scope of the subpoenas, to put some restrictions on them. Sometimes that can be done; many times, it cannot. And this is a situation where I think I cannot effectively or properly impose restrictions on turnover of certain documents, without an examination and analysis of the others. Because who is to decide that which is not turned over is relevant?

Since the Special Prosecutor would be denied access, he could not make that determination, and that leaves counsel for the petitioner. The Special Prosecutor, as I have indicated, is not bound by his determination.

Another possible party is the Court. That is not a very effective way to do it. As a matter of fact, it's quite impossible, because the Court has no knowledge of the underlying facts and is in no position to say whether or not a contribution to John Smith of Valley Stream, Long Island is in any way related to a nursing home investigation.

You could multiply those examples indefinitely. So the only solution that I see is to direct the accountant to turn over all of these records. In this regard, as to who can best decide by past experience earlier in the investigation, Shapiro against Chase is a prime example of that; the original subpoena was limited by the Court, and counsel could not agree among themselves as to what was relevant, and of course, the Court was unable to. Then an application was made before me, and I authorized full disclosure precisely on that basis. And the Appellate Division unanimously held in Shapiro that it was proper.

Now, there is an additional reason to support the argument of relevancy, and also coming under the umbrella of breadth, and that has to do with the further fact that initially, the Deputy

Colloquy

Attorney General for Nursing Homes, his jurisdiction was enlarged by a subsequent executive order to examine into private proprietary homes for adults because of what was disclosed during the course of the investigation. So subsequently, he was further authorized to look into any possible violations of the tax law.

Now, for all of these reasons, the acountant herein is directed to comply with the subpoena forthwith. The stay is vacated.

MR. BAINTON: Your Honor, we would respectfully request a stay of that direction for at least until next Wednesday, which would afford us an appropriate period of time to make an application before the Appellate Division for a longer stay.

THE COURT: I deny the application for the stay.

(Discussion off the record.)

THE COURT: Based upon my off the record discussion with counsel, rather than directing compliance forthwith, I will direct compliance at 9:30 Thursday morning, which is November the 3rd, 1977.

MR. BAINTON: Thank you, Your Honor.

THE COURT: And this constitutes, by agreement, notice to counsel.

MR. BAINTON: That is correct, Your Honor.

THE COURT: Thank you, gentlemen.

APPENDIX B

At a Trial Term, Part 37, of the Supreme Court of the State of New York, County of New York, held at the Courthouse thereof, 100 Centre Street, New York, New York, on the 2nd day of November, 1977.

PRESENT:

HON. ALOYSIUS J. MELIA,

Justice

In the Matter of the Application of

CHARLES E. SIGETY and KATHARINE S. SIGETY,

Petitioners,

—against—

CHARLES J. HYNES, Deputy Attorney General of the State of New York (Special Prosecutor) and FRANCIS WASCHLER,

Respondents,

For an Order Pursuant to Article 23 of the Civil Practice Law and Rules.

Not Presently Assigned to an IC Part.

Index No. 19990/77

JUDGMENT

Petitioners, by their attorneys, Reboul, MacMurray, Hewitt, Maynard & Kristol, having moved this Court by order to show cause dated October 26, 1977, for an order pursuant to CPLR 2304, vacating in part the subpoena *ad testificandum* and *duces tecum* dated October 4, 1977, served on respondent Francis Waschler by respondent Charles J. Hynes.

Now, upon the order to show cause dated October 26, 1977, the affidavit of petitioner Charles E. Sigety, sworn to October 26, 1977, together with the exhibits annexed thereto, the affirmation of David E. Ruck, Esq., dated October 27, 1977, together with the exhibit annexed thereto, the affidavit of Francis Waschler, sworn to October 26, 1977, and the letter of J. Joseph Bainton, Esq., dated October 27, 1977, to Hon. Aloysius J. Melia; and after hearing J. Joseph Bainton, Esq., on behalf of petitioners, and David E. Ruck, Esq., on behalf of respondent Charles J. Hynes and James J. Mahon, Esq., on behalf of Francis Waschler, and upon the decision of this Court rendered from the bench on October 28, 1977, and after due deliberation having been had thereon;

Now, on motion of Reboul, MacMurray, Hewitt, Maynard & Kristol, attorneys for petitioners, it is

ORDERED, that petitioners' motion pursuant to CPLR 2304, to vacate, in part, the subpoena *ad testificandum* and *duces tecum*, dated October 4, 1977, served on respondent Francis Waschler by respondent Charles J. Hynes, shall be denied in all respects upon the grounds that (a) petitioners lack standing to move to quash the said subpoena and (b) assuming petitioners had standing, the subpoena is otherwise lawful; and it is

FURTHER ORDERED that respondent Francis Waschler comply with the said subpoena by 9:30 a.m. on Thursday, November 3, 1977.

ENTER

ALOYSIUS J. MELIA

J.S.C.

APPENDIX C

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 30, 1978.

Present—Hon. FRANCIS T. MURPHY, JR., *Presiding Justice*
VINCENT A. LUPIANO
SAMUEL J. SILVERMAN
ARNOLD L. FEIN
JOSEPH P. SULLIVAN, *Justices.*

In the Matter of the Application of

CHARLES E. SIGETY and KATHARINE S. SIGETY,

Petitioners-Appellants,

—against—

CHARLES J. HYNES, Deputy Attorney General of the State of New York (Special Prosecutor) and FRANCIS WASCHLER,

Respondents-Respondents,

for an order pursuant to Article 23 of the Civil Practice Law and Rules.

2285 N

An appeal having been taken to this Court by the petitioners-appellants from the judgment of the Supreme Court, New York County (Melia, J.), entered on or about November 2, 1977, which denied their motion to vacate in part a subpoena served by respondent Hynes on respondent Waschler, and said appeal having been argued by Mr. J. Joseph Bainton of counsel for the appellants, and by Mr. T. James Bryan of counsel for respondent Hynes; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed, and that the respondent Hynes shall recover of the appellants $40 costs and disbursements of this appeal.

ENTER:

Joseph J. Lucchi

Clerk.

APPENDIX D

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of
CHARLES E. SIGETY
and
KATHARINE S. SIGETY,

Petitioners,

—against—

CHARLES J. HYNES, Deputy Attorney General of the State of New York (Special Prosecutor) and FRANCIS WASCHLER,

Respondents,

For an Order Pursuant to Article 23 of the Civil Practice Law and Rules.

Index No. 19990/77
NOTICE OF APPEAL

PLEASE TAKE NOTICE that petitioners hereby appeal to the Supreme Court of the United States from the order of the Supreme Court of the State of New York, Appellate Division, First Department, dated March 30, 1978, which affirmed the judgment entered herein on November 2, 1977, and this appeal is taken from each and every part of said order as well as from the whole thereof.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: New York, New York
April 5, 1978

REBOUL, MACMURRAY, HEWITT,
MAYNARD & KRISTOL
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To:

CLERK, NEW YORK COUNTY

CHARLES J. HYNES, Deputy
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270 Broadway
New York, New York 10007

MESSRS. KOSTELANETZ & RITHOLZ
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1854

In the Matter of the Application of

CHARLES E. SIGETY and
KATHARINE S. SIGETY,

Appellants,

against

CHARLES J. HYNES, Deputy Attorney General
of the State of New York (Special Prosecutor)
and FRANCIS WASCHLER,

Appellees,

For an Order Pursuant to Article 23 of the
Civil Practice Law and Rules.

On Appeal from the Supreme Court of the State of New York, Appellate Division, First Department

MOTION TO DISMISS OR AFFIRM

CHARLES J. HYNES
Deputy Attorney General
State of New York
Appellee pro se
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New York, New York 10007
(212) 488-5767

RICHARD D. CARRUTHERS
Special Assistant Attorney General
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

Executive Orders:

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1854

In the Matter of the Application of

CHARLES E. SIGETY and KATHARINE S. SIGETY,

Appellants,

against

CHARLES J. HYNES, Deputy Attorney General of the State of New York (Special Prosecutor) and FRANCIS WASCHLER,

Appellees,

For an Order Pursuant to Article 23 of the Civil Practice Law and Rules.

On Appeal from the Supreme Court of the State of New York, Appellate Division, First Department

MOTION TO DISMISS OR AFFIRM

Appellee Charles J. Hynes, Deputy Attorney General of the State of New York and Special State Prosecutor for Nursing Homes, Health and Social Services hereby moves that the Court dismiss this appeal from an order of the Appellate Division of the Supreme Court of the State of New

York upon the grounds that the appeal is not within the jurisdiction of the United States Supreme Court and that the issue presented therein is moot. In the alternative, appellee Hynes moves that this Court affirm the aforementioned order upon the ground that the issue is so unsubstantial as not to warrant further argument.

Statement of the Case

The Attorney General of the State of New York and his deputies must, when ordered to do so by the Governor, "inquire into matters concerning the public peace, public safety and public justice." McKinney's Consolidated Laws of New York, Executive Law §63(8). By his Executive Order No. 4, Governor Hugh L. Carey directed the Attorney General to

> inquire into matters concerning the public peace, public safety and public justice with respect to possible criminal violations committed in connection with or in any way related to the management, control, operation or funding of any nursing home, care center, health facility or related entity located in the State of New York, or any principal, agent, supplier or other person involved therewith, and I so direct you to do so in person or by your assistant or deputies and to have the powers and duties specified in such subdivision 8 [of Executive Law Section 63] for the purpose of this requirement.

9 New York Codes, Rules, and Regulations (N.Y.C.R.R.) §3.4.

The Attorney General appointed appellee Charles J. Hynes as his deputy and assigned to him the duty of conducting the inquiries mandated by Governor Carey's order.

The Attorney General specifically charged Mr. Hynes with the task of investigating any allegations that persons in the nursing home industry had violated New York State's Tax Law.

By authority of Executive Law Section 63(8) and in accord with his investigative responsibilities, Deputy Attorney General Hynes issued a subpoena duces tecum to Francis Waschler, a certified public accountant, on October 4, 1977. The subpoena commanded Mr. Waschler to produce before Deputy Attorney General Hynes his copies of the joint federal, state, and local income tax returns which he had prepared for the appellants, Mr. Charles E. Sigety and Mrs. Katharine S. Sigety, for the years 1970 through 1976, as well as the working papers and supporting documents used by Mr. Waschler in preparing the returns. Appellant Charles E. Sigety owns and operates the Florence Nightingale Nursing Home which is located in New York City.*

Mr. and Mrs. Sigety moved in the Supreme Court of the State of New York, New York County, for an order vacating, in part, the subpoena issued to Mr. Waschler. They brought their motion under Section 2304 of the New York Civil Practice Law and Rules (C.P.L.R.). They contended

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* By an earlier subpoena, which also was issued pursuant to Executive Law Section 63(8), Deputy Attorney General Hynes commanded appellant Charles Sigety to produce before him the financial books and records of Florence Nightingale Nursing Home. The subpoena was subsequently upheld as valid by the Court of Appeals of New York State. *Matter of Sigety* v. *Hynes*, 38 N.Y.2d 260, 379 N.Y.S.2d 724, 342 N.E.2d 518 (1975). Mr. Sigety did not comply fully with this earlier subpoena. Thus, the Supreme Court of the State of New York adjudged him to be in civil contempt. See *Matter of Hynes* v. *Sigety*, N.Y.L.J., August 5, 1977, at 13, col. 1 (Sup. Ct., N.Y. Co.), *aff'd*, 60 A.D.2d 808, —— N.Y.S.2d —— (1st Dept. 1978).

that the subpoena was overly broad to the extent that it required production of records which did not on their face reflect a relationship to transactions involving nursing homes. Mr. Waschler did not enter any opposition to the subpoena. Instead, he informed the court that he would abide by its decision on the motion, whether or not that decision was favorable to Mr. and Mrs. Sigety.

Deputy Attorney General Hynes opposed the Sigetys' motion. He argued that the Sigetys lacked standing to object to the subpoena, because the subpoena had been issued to a third party, Mr. Waschler, who had exclusive possession of the subpoenaed documents. To support his argument, Mr. Hynes cited *Couch* v. *United States,* 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973); *Fisher* v. *United States,* 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); *United States* v. *Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed. 2d 71 (1976); and *Shapiro* v. *Chase Manhattan Bank,* 53 A.D.2d 542, 384 N.Y.S.2d 795 (1st Dept. 1976). The Deputy Attorney General then observed that, even if the Sigetys had standing, his authority to investigate possible state tax violations by persons involved in the nursing home industry entitled him to obtain Mr. Waschler's copies of the tax returns by means of the subpoena.

On October 28, 1977, Justice Aloysius J. Melia of the Supreme Court of the State of New York delivered an oral decision concerning Mr. and Mrs. Sigety's motion. He accepted Mr. Hynes' argument. Thus, Justice Melia held that the Sigetys did not have standing to move to quash or modify the subpoena. Appellants' Appendix A at 3a. Justice Melia also found that, assuming for the sake of argument that the Sigetys had standing, their objection to the breadth of the subpoena was meritless:

I do not think that is so, I find no standing. But again, assuming standing, I think that the subpoena is not effective [*sic*] for overbreadth or for lack of relevancy.

In that connection, I might point out that the history of the nursing home investigation is extensive. It had its genesis in legislative inquiries and the appointment of legislative commissions. In addition, the executive branch of the government, in the person of the governor, saw fit to appoint the Abrams Commission [Hon. Hugh Carey, Executive Order Nos. 2 and 2.1, 9 N.Y.C.R.R. §3.2] to look into this general area as well.

So unlike the Lentini case [*Myerson* v. *Lentini Bros. Mov. & Stor. Co., Inc.,* 33 N.Y.2d 250, 351 N.Y.S. 2d 687, 306 N.E.2d 804 (1973)], where the activities of a City commissioner were found defective in this regard, because of a lack of relevancy—there, it was just a haphazard use of the power of subpoena without a proper showing of relevancy—here, based upon the history of this investigation, which, as I say, has been extensive, bringing into play the powers of the legislature, the powers of the governor, and from all of that, it was determined that there was adequate basis for the governor, acting through the Attorney General, and vice versa, to appoint a special prosecutor to examine that which was unearthed during the legislative investigations, as well as the governor's interest in the matter. So the extraordinary remedy of the appointment of the Special Prosecutor was found to be required, and that was done, and the investigation has proceeded.

Now, there seems to be, first of all, relevancy as to the overall investigation. As to the breadth, because of the findings of these various commissions and legislative bodies, the breadth and scope of the investigation, as found in the executive order signed by the governor, is quite broad. And insofar as we are concerned here with nursing homes, in effect, it directs the Special

> Prosecutor to go into every aspect of the operation of nursing homes, to examine the whole gamut.
>
> Clearly, in the case we have here, Sigety, it is conceded that some aspects of the tax returns are concerned with the nursing home. It is conceded [by the Sigetys], first of all, that they are relevant and it is agreeable to turn them over. The argument is merely that the rest of the tax returns are not relevant.
>
> Well, first of all, the law is very clear that opposing counsel is not required to accept the dictum of the other counsel that they aren't relevant; that is a determination that counsel is permitted to make on his own.

Appellants' Appendix A at 3a-4a.

A formal order denying Mr. and Mrs. Sigety's motion was entered in the New York Supreme Court on November 2, 1977. The order reflected Justice Melia's decision in this decretal paragraph:

> ORDERED, that petitioners' [i.e. the Sigetys'] motion pursuant to CPLR 2304, to vacate, in part, the subpoena *ad testificandum* and *duces tecum*, dated October 4, 1977, served on respondent Francis Waschler by respondent Charles J. Hynes, shall be denied in all respects upon the grounds that (a) petitioners lack standing to move to quash the said subpoena and (b) assuming petitioners had standing, the subpoena is otherwise lawful[.]

See Appellants' Appendix B at 1b-2b.

Mr. and Mrs. Sigety appealed to the Appellate Division of the Supreme Court. That court stayed enforcement of the subpoena pending appeal.

In their appeal to the Appellate Division the Sigetys confined their argument to the question of standing. They did not contest the finding of Supreme Court at *nisi prius* that the subpoena itself was lawful. After the Appellate Division heard the Sigetys' appeal, it unanimously affirmed the Supreme Court's order by its own order, dated March 30, 1978. The Appellate Division did not hand down an opinion with its order.

Mr. and Mrs. Sigety did not appeal the Appellate Division's order to New York's highest court, the Court of Appeals. Instead, they brought the instant appeal directly to the United States Supreme Court. The sole issue which they present in this appeal is whether the New York courts erred in ruling that the appellants lacked standing to challenge the subpoena.*

POINT I

This appeal should be dismissed for want of jurisdiction.

This Court has jurisdiction to hear a direct appeal from a judgment or decree of a state court upholding a state statute against a claimed federal constitutional or statutory right only if the state court is "the highest court of a State in which a decision could be had." 28 U.S.C. 1257(2). When the state court is not the highest court which could have determined the federal issue, a direct appeal to this Court must be dismissed. *Costarelli* v. *Massachusetts*, 421 U.S. 193, 95 S.Ct. 1534, 44 L.Ed. 2d 76 (1975).

The appellants assert that this Court has jurisdiction under 28 U.S.C. 1257(2) to hear a direct appeal from the

* The subpoena has not been executed as of the time of this writing due to a stay of enforcement granted by the Appellate Division.

unanimous order of the Appellate Division of New York State Supreme Court which affirmed a *nisi prius* determination that they lacked standing to move under New York's Civil Practice Law and Rules for an order modifying, on grounds of overbreadth, the subpoena duces tecum issued by the Deputy Attorney General to their accountant. Appellants' Jurisdictional Statement at 4. In making this statement, they claim that by law they could not have appealed the Appellate Division's order to New York State's highest court, the Court of Appeals. *Id.*

The appellants are incorrect in stating that a further appeal to the New York Court of Appeals was impermissible. Indeed, the Constitution of New York State affords an appellant a right to appeal to the Court of Appeals from a judgment or order entered upon the decision of the Appellate Division of the Supreme Court "which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States[.]" N.Y.Const. Art. IV §3(b)(1). Section 5601(b)(1) of the New York Civil Practice Law and Rules reflects the constitutional provision with these words:

> An appeal may be taken to the court of appeals as of right from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States.

Moreover, several decisions of the Court of Appeals show that the court itself unequivocally recognizes an appellant's right to appeal to it from a unanimous ruling of the Appellate Division when the case presents a substantial constitutional question.* See, *e.g.*, *Hama Realty Co.* v. *City of N.Y.*, 20 N.Y.2d 794, 284 N.Y.S.2d 451, 231 N.E.2d 128 (1967); *Matter of Briguglio* v. *Board of Parole*, 23 N.Y.2d 669, 295 N.Y.S.2d 924, 243 N.E.2d 144 (1968); *Matter of Kariem Al Sabaa* v. *Casscles*, 34 N.Y.2d 791, 358 N.Y.S.2d 776, 315 N.E.2d 816 (1974); *Nelson* v. *Mundt*, 25 N.Y.2d 909, 304 N.Y.S.2d 601, 252 N.E.2d 134 (1969); *Zeigler* v. *Reily*, 30 N.Y.2d 517, 330 N.Y.S.2d 63, 280 N.E.2d 890 (1972), *cert. denied*, 409 U.S. 1029, 93 S.Ct. 469, 34 L.Ed.2d 323 (1972).

Since the appellants failed to avail themselves of their right to appeal the Appellate Division's order to the New York Court of Appeals, the highest court which could have passed upon what they claim to be a substantial constitutional issue, their appeal to this Court does not meet all of the requirements for jurisdiction contained in 28 U.S.C. 1257(2).** Therefore, the appeal must be dismissed.

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* Section 5601(a) of the Civil Practice Law and Rules grants a right to appeal to the Court of Appeals from an order of the Appellate Division when there has been a dissent in the Appellate Division, or where the Appellate Division has reversed or modified a determination of a lower court. The right to appeal under Section 5601(a) lies even though the case does not present a constitutional issue.

** Shortly after the *nisi prius* court denied the appellants' motion to quash the subpoena, the Appellate Division stayed enforcement of the subpoena pending their appeal. Had the appellants appealed as of right to the Court of Appeals after the Appellate Division affirmed the *nisi prius* order, the stay granted by the Appellate Division would have continued, without the need for further application by the appellants, until the Court of Appeals had heard and determined the appeal. McKinney's N.Y. C.P.L.R. §5519(a). *See DFI Communications* v. *Greenberg*, 41 N.Y.2d 1017, 395 N.Y.S.2d 639, 363 N.E.2d 1384 (1977). Thus, the subpoena could not have been enforced until the Court of Appeals first had ruled upon the merits of the appellants' appeal.

POINT II

This appeal should be dismissed for mootness.

The sole issue which the appellants raise in their jurisdictional statement is whether they had standing to argue in the New York State Supreme Court that the subpoena to their accountant was overly broad. Jurisdictional Statement at 4. Although the state court at *nisi prius* held that the appellants lacked standing, it nevertheless made a ruling on the merits of the overbreadth argument. Indeed, the court expressly stated both orally and in its formal order that, assuming the appellants had standing to raise the argument, the subpoena was not defective in any respect. See Appellants' Appendix A at 4a-5a, and Appellants' Appendix B at 1b-2b.

In the Appellate Division of the New York Supreme Court, the court which rendered the order from which the appellants now appeal, the appellants confined their arguments to the standing issue. They did not present any argument concerning the New York Supreme Court's rejection of their contention that the subpoena was defective for overbreadth.*

Since the appellants' objection to the subpoena as overly broad actually was decided on the merits by the New York Supreme Court, the only court before whom the appellants placed the contention, the issue of their standing to raise the overbreadth objection is moot. *Cf. DeFunis* v. *Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

* The Appellate Division unanimously upheld the Supreme Court's order without opinion.

Indeed, were the United States Supreme Court to reverse on the standing issue, the sole issue now before it, the New York Supreme Court's determination on the merits of the appellants' objection to the subpoena would remain undisturbed.

POINT III

Assuming that this Court has jurisdiction to hear this appeal and that the issue of the appellants' standing is not moot, the order of the Appellate Division of New York Supreme Court should be affirmed.

The subpoena duces tecum which the appellants sought to modify in the New York courts was issued by Deputy Attorney General Hynes to Francis Waschler, an independent accountant, for his retained copies of certain joint income tax returns and working papers prepared by him for the appellants. Mr. Waschler did not object to the subpoena. The appellants, however, moved in New York Supreme Court for an order modifying the subpoena on grounds of overbreadth. That court held, in part, that the appellants lacked standing to bring this motion, since the subpoena had been issued to a third party who had exclusive possession and control of the subpoenaed documents. This determination was affirmed by the Appellate Division in the order from which this appeal is taken.

The decision of the United States Supreme Court in *United States* v. *Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), is dispositive of the issue of standing, the sole issue raised by the appellants on this appeal. The Court held in *Miller* that a depositor lacked standing to challenge a subpoena duces tecum issued by the

government to a bank for the records of the depositor's account. The Court based this conclusion upon the well settled principle that the Fourth Amendment cannot be invoked by a person to prevent the government from obtaining information disclosed by him to a third party, regardless of the intended confidentiality of that disclosure.* As stated by the Court:

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, *even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed* (emphasis added).

United States v. *Miller, supra*, 425 U.S. at 443.

This Court's decision in *Miller* was in full accord with its earlier decision in *Couch* v. *United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973). The facts in *Couch* are remarkably similar to the facts of the instant case. In *Couch*, the Internal Revenue Service had issued a summons to an accountant commanding the production of various business records belonging to Ms. Couch. Ms. Couch previously had delivered these records to the accountant to enable him to complete her tax returns. The Internal Revenue Service commenced a proceeding to compel compliance with the subpoena. Ms. Couch intervened in the proceeding. She claimed that compliance with the subpoena by her accountant would violate her rights under the Fourth and Fifth Amendments. 409 U.S. at 325, n.6. This Court held that Ms. Couch had no right under either amendment to bar her accountant from complying with the summons. The Court observed that the essential ingredient for a violation of the privilege against self-incrimination, compulsion against the person giving the evidence, was missing, since the subpoena was directed to Ms. Couch's accountant and not to herself. 409 U.S. at 336. The Court also found that Ms. Couch could not object to compliance with the summons on Fourth Amendment grounds because she had no legitimate expectation of privacy in the records called for by the summons. *Id.*

* New York law does not provide a privilege of confidentiality between an accountant and his client.

Application of the holdings of *Miller* and *Couch* to the facts of the present appeal leads ineluctably to the conclusion that the New York courts were correct in ruling that the appellants lacked standing to object to the subpoena duces tecum. The appellants willingly divulged to their accountant, Mr. Waschler, the information which he used to prepare their joint tax returns. They knowingly took the risk that their accountant might disclose this information, which is now memorialized in his retained copies of those returns and his working papers, to third parties other than the Internal Revenue Service. Therefore, under *Miller* and *Couch*, the appellants canont claim that the Deputy Attorney General should be prevented from obtaining that information from a third party by means of the subpoena duces tecum.

Since the holdings of *Miller* and *Couch* are contrary to the position taken by the appellants on the standing issue, the present appeal is unsubstantial. Therefore, if this appeal should not be found defective for want of jurisdiction and for mootness, the order of the Appellate Division of New York Supreme Court should be affirmed without further argument.

Conclusion

This appeal should be dismissed upon the ground that the United States Supreme Court lacks jurisdiction to entertain it and upon the additional ground that the appeal is moot. In the alternative the order from which the appeal is taken should be affirmed without further argument.

Respectfully submitted,

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